STATE OF MICHIGAN

COURT OF APPEALS

STEVEN RAY BADGLEY,

Plaintiff-Appellant,

v

MEEGAN CULLEN,

and

DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellees.

UNPUBLISHED
May 10, 2007

No. 264614
Clinton Circuit Court
Family Division
LC No. 05-017878-DP

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's dismissal with prejudice of his complaint to establish paternity of three minor children, Levi, Hunter and Dakota Badgley. We reverse and remand for further proceedings.

I. Facts and Procedural History

Jennifer Ash is the mother of Levi, Hunter and Dakota Badgley. Jennifer was married to Shawn Ash at some point prior to 1996, but had been estranged from him since that time. Sometime after her estrangement from Shawn in 1996, Jennifer began to cohabitate with plaintiff, but did not divorce Shawn. Jennifer gave birth to Levi in 1999, to Hunter in 2000 and to Dakota in 2002. After their births, Shawn was ordered to pay support for Levi and Hunter.

In May 2002, Jennifer and plaintiff appeared at a preliminary hearing concerning the alleged neglect of Levi and Hunter. During the hearing, the trial court inquired about plaintiff's appearance. In response, plaintiff explained that he was the father of Levi and Hunter. The court then asked why plaintiff was listed as the putative father and Shawn Ash was listed as the legal father. Jennifer confirmed that she was separated from Shawn, but currently still married to him.

THE COURT: All right. But not withstanding that, Mr. Badgley, that you can tell the Court that the – you know by a moral certainty that you are the father of Levi and Hunter?

MR. STEVEN BADGLEY: Yes, sir.

THE COURT: No doubt about it?

MR. STEVEN BADGLEY: Well, there's always a doubt, I guess, there has never been an accurate blood test done for a hundred percent for sure.

THE COURT: Well, were you living with the mother – with Ms. Ash as the time that conception would or could have occurred?

MR. STEVEN BADGLEY: Yes.

THE COURT: All right. So I don't want to put words in your mouth, to the best of your knowledge, information and belief it is not likely that conception could have occurred with anyone else?

MR. STEVEN BADGLEY: No, sir.

THE COURT: All right. Now, Ms. Ash, you apparently left Shawn Ash and began living with Mr. Badgley; is that right?

MS. ASH: I left Shawn Ash in '96.

THE COURT: All right. Never filed for divorce?

MS. Ash: I've tried, I have a P.O. Box address and he keeps moving on me.

THE COURT: All right. Ma'am, again, to – at the risk of being unduly repetitive, I just want to ask you, do you know with a moral certainty that no other man could have biologically fathered these children; is that correct?

MS. ASH: Right.

After this exchange, the court inquired about whether Shawn had been given notice of the hearing. The Family Independence Agency caseworker assigned to the case stated that she had contacted Shawn about the proceeding and that he said that he did not want to have anything to do with it. The trial court then explained that the hearing was being held as a result of a petition to take jurisdiction over the children because of neglect. After summarizing the allegations of the petition, the trial court told Jennifer and plaintiff about their rights and warned that the proceedings could eventually result in the removal of the children, if the court takes jurisdiction and finds that the children are at risk. Both Jennifer and plaintiff denied the allegations of the petition.

After this hearing, additional child protective proceedings concerning the children were held over the course of the next three years. At these hearings, the trial court continued to treat

plaintiff as the father. However, at a hearing held in April 2005, a new judge, apparently sua sponte, determined that plaintiff had no standing to be at the hearing. The trial court explained,

> As I reviewed the motions and I had another hearing come up earlier this week. Mr. Ash appeared and wanted to release his parental rights,[1] and in reviewing the file I was not involved in this case from the beginning and for a while I recused myself and so I had very little interaction with this file. So I wanted to see which children were his for him to release his rights, if any. In reviewing the file Mr. Ash was married to Ms. Ash when the children were conceived and born. Under the law that makes him the legal father to all three children. There was never an order entered at any time in this file that suggested he was not the legal father to these children and so he did come in and release his parental rights. There is no putative father in this case. Mr. Badgley has no standing.

The trial court then discharged plaintiff's court appointed attorney and told plaintiff that he would not need to appear at the trial. Plaintiff's attorney did not object and did not ask for an adjournment in order to investigate whether plaintiff did in fact have standing. Indeed, plaintiff's attorney even stated that he had thought plaintiff "had standing problems all along." Plaintiff protested and noted that he had had a DNA test to prove his paternity. The court then stated,

> There was never, I didn't see the results but there – but I understand there were tests done but there was no order suggesting that you are – that – suggesting that Mr. Ash was not the father of these children. And there needed to be something that got him out of the picture as the father of these children. There was nothing that did that, and you only had 14 days – a 14 day period within which to have that done – proceed to have that done. I don't know why an order was never entered to have that done. But there is only one legal father in this case and there is nothing in the record to alleviate him of his standing and he released his parental rights. I don't know why that wasn't pursued in the case. I – like I said I came in the middle of this case, and I apologize to you because you have been involved in this case and participated, and I am not sure why you were either not let out of the case earlier or an order was entered saying that you were their father and not Mr. Ash, but all I have before me is that Mr. Ash is the legal father. There is nothing suggesting otherwise and he released his parental rights.

When plaintiff asked what he could do to establish his parental rights, the trial court told him that he could no longer do so. Plaintiff then stated, "So I just lost my kids today then?" To which the trial court responded, "Yes." At this point, the guardian ad litem suggested that plaintiff be given a farewell visit with the children. The court accepted the suggestion and gave plaintiff one last supervised visit with the boys.

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[1] We note that, at his release hearing, Shawn testified that the children were not his and that he had not had contact with Jennifer since 1996. He further acknowledged that the only reason that he had paid support for the children was because he did not know how to obtain a divorce from Jennifer.

Plaintiff did not appeal the trial court's decision to dismiss him from the previous proceedings. Instead, plaintiff commenced the present paternity suit. The paternity suit was assigned to the same judge.

In July 2005, a hearing regarding plaintiff's paternity suit was held. At the hearing, plaintiff's attorney argued that the presumption that the children were the product of a legal marriage had been rebutted. The trial court disagreed.

> That isn't the case, actually. And, here's what I'd like you to address. The law says that there is a presumption that arises when there's a marriage between two people. The presumption can be rebutted at a prior proceeding but – and, the mother can do it by asking the legal father to have biological testing, DNA testing. She never did that here. The only thing that we know is Mr. Badgley had DNA testing, and it could not exclude him as the father. There's been no determination that he is the father of these children. And, Mr. Ash, rather than – rebutted the presumption. Rather than the two parties going through a divorce proceeding, MR. Ash came before this Court and said, I recognize I'm the legal father and I'm releasing my rights. So, I, I need you to distinguish that for me.

Plaintiff's attorney responded that, although there was no specific order declaring the presumption to be rebutted, there was ample evidence on the record to conclude that the court had determined that the presumption was rebutted. However, plaintiff's attorney did not specifically present evidence that the court's predecessor had made a determination that the children were not the issue of the marriage between Jennifer and Shawn Ash. Plaintiff's attorney explained that he did not yet have a full record, but that he believed that the presumption had been rebutted during the earlier proceedings.

After the parties' presented their arguments, the trial court determined that plaintiff did not have standing to bring a paternity action.

> This situation is constantly challenged by the Michigan courts where you have the birth, conception and birth of a child to a woman who's married and there are claims that the husband is not the father, biological father of the children. However, I have to follow the law. And, as tough a situation as some of these are, the facts here are that Miss Ash was married to Shawn Ash when the children were conceived and born, and that creates a presumption that, according to the law, is one of the strongest presumptions we have, that the husband is the legal father. Where there is a legal father, there can be no putative father.
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> Now, that presumption, as [plaintiff's attorney] indicated, it can be rebutted, and it can be rebutted by clear and convincing evidence. However, ways to do that certainly require that evidence be placed on the record to rebut that presumption.
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> The other problem we have here is that, in a neglect case, paternity cannot be established. So, whether Mr. Badgley was treated as a father figure or referred to as a father, doesn't make him so, doesn't rebut that presumption and take away the fact that Shawn Ash was still the legal father. The mother could've requested that the legal father submit to testing . . . . But, that wasn't done here. The legal

> father never took a test that excludes him as the biological father. She never gave testimony of access or nonaccess. And, the courts have also said that the mother's testimony that she's uncertain who the legal father is, the biological father is, is insufficient to rebut the presumption. . . . The biological father cannot seek determination that he's a legal father unless the presumption is rebutted in a prior proceeding . . . .
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> There's nothing here that was done by any of these parties to properly rebut the presumption prior to Mr. Ash releasing his parental rights.
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> Whether Mr. Ash saw these kids, was interactive with these kids is irrelevant. He was married to the mother at all times, conceived and during birth. He paid child support. . . . Mr. Badgley was ordered to reimburse for out-of-home placement. I'm not gonna make a determination whether that was an appropriate or inappropriate order, but that has nothing to do with paternity. And, it certainly didn't undermine the fact that Mr. Ash had a child support order for all these kids, all of these kids that he was paying on. Then, he came in here, represented to the Court that he recognized that he was deemed the legal father, and he voluntarily released his parental rights. Unfortunately for Mr. Badgley, and I do believe it's unfortunate but the law does not support his position and doesn't support him standing in this action.

For these reasons, on July 11, 2005, the trial court entered an order dismissing plaintiff's paternity suit with prejudice. Plaintiff then filed a motion for reconsideration wherein he presented the transcripts of the May 2002 hearing where the trial court inquired about the paternity of the children. Without stating any reasons, the trial court denied the motion for reconsideration. This appeal followed.

II. Standing

On appeal, plaintiff argues that the trial court erred when it determined that he lacked standing to bring an action to establish the paternity of the three minor children. Specifically, plaintiff argues that the presumption of legitimacy had been rebutted during the earlier child protective proceedings and, therefore, that he had proper standing to bring a paternity action. We agree.

Whether a party has standing to bring an action is a question of law that this Court reviews de novo. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). In addition, this Court reviews de novo the proper interpretation of statutes such as the Paternity Act, MCL 722.711 *et seq.* *State Farm Fire & Casualty Co v Corby Energy Service, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006). "The goal of statutory interpretation is to give effect to the Legislature's intent as expressed in the statutory language." *Id.* If the language of the statute is unambiguous, this Court is neither required nor permitted to construe it, but must enforce it as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Under the paternity act, in relevant part, only the mother or the father of a child born out of wedlock may commence a paternity action. See MCL 722.714(1); *In re KH*, *supra* at 631-632. A "child born out of wedlock" is defined as "a child begotten and born to a woman who

was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a). In the present case, the children at issue were clearly born to Jennifer while she was still married to Shawn. Therefore, plaintiff's standing must be determined by application of the second clause of the definition.

> To meet the requirements of the second clause under the statutory definition, there must exist a child born out of wedlock—a child which the court has determined to be a child born during, but not the issue of, the natural mother's marriage. Using the common and approved usage of the terms in the statute, . . . we find that a literal construction of this clause, coupled with the filing requirement clause, requires a prior court determination that a child is born out of wedlock. [*Girard v Wagenmaker*, 437 Mich 231, 242; 470 NW2d 372 (1991).][2]

In reaching this conclusion, the Court explained that this interpretation was mandated by the plain language of the statute and noted that the literal reading of the "'has determined' language to require a prior determination that the child is not the issue of a marriage comports with the traditional preference for respecting the presumed legitimacy of a child born during marriage." *Id.* at 246, citing *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). Hence, where the child was born to a woman who was married, in order for a mother or father to have standing to bring a paternity action, there must have been a prior court determination that the child was not the issue of the marriage. *In re KH*, *supra* at 632.

The paternity act does not define what constitutes a prior determination within the meaning of MCL 722.711(a). Likewise, although the Court in *Girard* held that a putative father must allege and establish that there was a prior court determination that the child was born out of wedlock, see *Girard*, *supra* at 244, the Court did not specifically address what would constitute a sufficient prior determination. Instead, it simply concluded that, because no previous or ongoing actions existed to determine the child's paternity, the plaintiff could not meet the standing requirements of the paternity act. *Id.* at 243. Since the decision in *Girard*, there have been very few decisions that directly address what constitutes a prior determination sufficient to grant standing to a putative father under the paternity act.

In *In re KH*, our Supreme Court examined a putative father's standing to request a determination of paternity during a child protective proceeding. In examining the issue, the Court first noted that there was a deeply rooted presumption that children born or conceived during a marriage are the issue of that marriage, which can only be overcome by clear and convincing evidence. *In re KH, supra* at 634. The Court went on to explain that,

> [b]y requiring a previous determination that a child is born out of wedlock, the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue in a prior

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[2] Although the Court interpreted the paternity act as it existed in 1985, see *Girard*, *supra* at 234, the language defining "child born out of wedlock" has not changed.

> proceeding—the mother and the legal father. As this Court noted in *Girard*, paternity claims generally arise during divorce or custody disputes, and the Legislature contemplated "situations where a court in a prior divorce or support proceeding determined that the legal husband of the mother was not the biological father of the child." If the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered the issue of the marriage despite lacking a biological relationship with the father. [*Id.* at 635 (citations omitted).]

Although the Court concluded that "[n]othing in the prior or amended court rules permits a paternity determination to be made in the midst of a child protective proceeding," *id.* at 633-634, the Court noted that, in a child protective proceeding, the mother or legal father of a child could present evidence from which a trial court could conclude that the presumption of legitimacy had been rebutted, *id.* at 636-637. In turn, this finding could serve "as the prior determination needed to pursue a claim under the Paternity Act." *Id.* at 637.

In the present case, both plaintiff and Jennifer appeared at a preliminary hearing in a child protective proceeding. During that hearing, the trial court specifically inquired about the paternity of the children at issue. In response to these questions, Jennifer stated that she had been separated from her husband since 1996 and she acknowledged that Shawn was not the father of the children to a moral certainty. Likewise, the court inquired about whether Shawn had been given notice of the proceeding and a caseworker indicated that he had and that he stated that he wanted nothing to do with the proceeding. This evidence was sufficient for the trial court to find by clear and convincing evidence that the presumption of legitimacy had been rebutted. See *id.* at 636-637. Furthermore, although the trial court did not specifically state that it found that the presumption of legitimacy had been rebutted (i.e., that the children were not the issue of the marriage), it is clear from the totality of the circumstances surrounding the hearing that the trial court did in fact make such a determination. Therefore, we conclude that there was a prior determination that the children at issue were not the issue of the marriage between Jennifer and Shawn Ash within the meaning of MCL 722.711(a). Consequently, the trial court erred when it concluded that plaintiff did not have standing to pursue a paternity action under MCL 722.714(1).[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

[3] Given our resolution of this issue, we need not address plaintiff's remaining claims of error.